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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE ROMAN, Defendant and Appellant.	H026462 (Santa Clara County Super. Ct. No. CC265160)

STATEMENT OF THE CASE

After a court trial, defendant Jose Roman was convicted of four counts of committing lewd conduct with a child by force, violence, duress, menace, or fear. (Pen. Code, § 288, subd. (b)(1).)[1] The court imposed an upper term of eight years for one count and consecutive mid-terms of six years for the other three counts, resulting in a total sentence of 26 years. The court also ordered defendant to submit a sample for deoxyribonucleic acid (DNA) testing.

On appeal from the judgment, defendant contends that as to two counts, there is insufficient evidence he committed the lewd acts by force, violence, duress, menace, or fear. He claims defense counsel rendered ineffective assistance in failing to argue on his behalf at trial or sentencing. He also claims that the imposition of an aggravated term

[1] All further statutory references are to the Penal Code unless otherwise specified.

violates his right to a jury trial, and the order for DNA testing violates constitutional protection against unreasonable searches.

We agree that there is insufficient evidence of force or duress to support two of the convictions and reverse the judgment.

FACTS[2]

In early 2002, five-year-old Brenda reported to someone at her school that she had been molested. Police commenced an investigation and learned that Brenda, her parents Domingo and Juana, and her brother Javier had attended a party on New Year's Eve 2001 at the home of Antonio and Feliciana, their daughter Jenny, and her three brothers. In a tape-recorded interview, Brenda said that on the night of the party, she got sleepy and went to bed. At some point, defendant came in and lay down next to her. He then pulled down her pants and underwear and touched her vagina and buttocks, which woke her up. Defendant asked if she wanted a dollar. She said "no" because her mother would get angry. She started to cry, and defendant put his hand over her mouth and would not let her leave the room.

Police interviewed Jenny. Jenny said that defendant lived with her family for about one year. She reported that defendant touched her vagina and buttocks on Christmas Day and New Year's Day. She said that on Christmas Day, while she was asleep in her room, defendant came in, took off her clothes, and touched her skin. As she tried to get away, her mother opened the door, and Jenny went to her.

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[2] Defendant waived a preliminary hearing and jury trial. Thereafter, the parties stipulated that at trial, the court could consider the police reports, transcripts of the police interview with defendant, and transcripts of the police interviews with his two victims.

For purposes of confidentiality, we shall use first names in referring to the victims and their parents.

Jenny further reported that on New Year's Day, she was asleep with her cousin Brenda, and defendant came into the room, sat down, pulled down his pants and her pants and underwear, and touched her. She tried to get up, but this time he held her down.

Jenny said that in all, defendant touched her about nine different times during the time he lived with them. He told her to keep it a secret, but she told her cousin anyway.

Police interviewed defendant. He said that on Christmas Day, he had been drinking and using cocaine with his friends. He got sleepy and lay down in bed with Brenda. He kissed her buttocks. He said she woke up and started to cry because her underwear was pulled down. He then went to sleep. He denied touching her vagina on that occasion.

Defendant said that at the New Year's Eve party, he was drunk and sleepy so he went upstairs and lay down with Brenda and Jenny. He said he started to caress Jenny's face and then touched her vagina. Brenda woke up and started to cry. He offered her a dollar if she stopped crying. He then started to feel badly about what he was doing, and a moment later, one of the girls' mothers came into the room and took the children out. He denied touching Brenda or putting his hand over her mouth. He also denied pulling down his own pants.

Defendant asserted that he had touched Jenny a total of four different times. He said that one time, Jenny sat on his lap and started moving around, which aroused him. He reached under her clothes, and when he touched her just above her vagina, she got scared and ran off. On another occasion, she came over and started touching him, and he in turn started touching her.

At trial, defendant testified that he played with Jenny but never touched her in an inappropriate way. He said that toward the end of 2001, he went to a party where Brenda was present. However, he denied getting into bed with her or touching her. He said that he was high on cocaine during the police interview when he admitted inappropriate contact.

SUFFICIENCY OF THE EVIDENCE

Defendant contends that concerning two of the four convictions (counts 2 and 4), there is insufficient evidence of force of duress or any other circumstances that would establish a violation of section 288, subdivision (b)(1). Count 2 alleged a forcible lewd act against Jenny on Christmas Day; count 4 alleged a forcible lewd act against Jenny between January 1, 1999 and December 24, 2001.

When considering a challenge to the sufficiency of the evidence to support a criminal conviction, we determine whether there is substantial evidence—evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. In making this determination, we review the whole record in the light most favorable to the judgment, we draw all reasonable inferences from the evidence that support it, and we presume the existence of every fact the trier of fact could reasonably deduce from the evidence. Conversely, we do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319-320; *People v. Staten* (2000) 24 Cal.4th 434, 460; *People v. Jones* (1990) 51 Cal.3d 294, 314; *People v. Johnson* (1980) 26 Cal.3d 557, 578; e.g., *People v. Griffin* (2004) 33 Cal.4th 1015, 1028.)

To establish that defendant committed a lewd act against Jenny by "force," in violation of section 288, subdivision (b), the prosecution had to prove that he used "physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself. [Citation.]" (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13-14.)

To establish that he committed an act by "[d]uress," the prosecution had to prove that that defendant made " 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' [Citations.] 'The total

circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress.' [Citation.] Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family. [Citations.]" (*People v. Cochran, supra*, 103 Cal.App.4th at pp. 13-14.)

As to count 2, the People argue that defendant forcibly restrained Jenny by holding her arm when she tried to get away from him. (Cf. *People v. v. Babcock* (1993) 14 Cal.App.4th 383 [holding or restraining victim who tries to pull away].) However, when asked whether defendant held her on Christmas Day in the same way he restrained her on New Years Eve, Jenny did not say he held or restrained her in any way. She said only that when he touched her, she tried to get away; and as she was doing so, her mother opened the door, and she went to her mother. Although Jenny said she "tried" to get away, there is no evidence that defendant was holding her in the first place. Nor is there evidence to support an inference that when Jenny tried to get away, she was unable to do so because defendant resisted or impeded her effort. Rather, the record reflects that upon trying to get away, she succeeded because her mother came into the room.

As to count 4, the People point to the incident when Jenny sat on defendant's lap. According to the People, "[defendant] reached underneath Jenny's pants, and touched Jenny's upper thigh. . . . As [defendant] attempted to move his hand further up Jenny's thigh, she became 'scared,' jumped off [defendant's] lap, and ran away." The People argue that since the initial touching of Jenny's thigh violated section 288, his "further acts in attempting to touch Jenny's vagina, where Jenny resisted and fled, constituted an application of force above that necessary for a simple lewd touching . . . ."

The record does not support the People's version of what happened. Defendant did not say he touched Jenny's thigh and then tried to touch her vagina. He simply said he touched her "a bit higher than her vagina." In any event, defendant's alleged act of

attempting to touch Jenny for a second time was not force used to commit the initial touching. Rather, an attempted second touching would simply be an attempt to commit a second lewd act. Moreover, there is no evidence that defendant resisted or impeded Jenny's effort to get off his lap.

Alternatively, the People claim there is substantial evidence defendant committed both charged acts by duress. In particular, they note the evidence that defendant lived with Jenny's family for over two years and started molesting her when she was seven years old. He was older and bigger than she was. Before Christmas 2001, he molested her when they were alone in her brothers' bedroom. Although told her not to tell anyone, she told one person. She also said that she was uncomfortable about being molested.

In *People v. Espinoza* (2002) 95 Cal.App.4th 1287, no duress was found where the defendant did not restrain the victim, and the victim offered no resistance. (*Id*. at p. 1320.) The court stated, "No evidence was adduced that defendant's lewd act and attempt at intercourse were accompanied by any 'direct or implied threat' of any kind. While it was clear that [the victim] was afraid of defendant, no evidence was introduced to show that this fear was based on anything defendant had done other than to continue to molest her." (*Id*. at p. 1321.)

In *People v. Hecker* (1990) 219 Cal.App.3d 1238, the court found no duress where the victim said she was not afraid the defendant would harm her (*id*. at p. 1242) but testified that she felt " 'pressured psychologically' " and " 'subconsciously afraid' " (*id*. at p. 1250). However, there was no evidence the defendant was aware of, or sought to take advantage of, such fear. (*Ibid.*) The court explained, " 'Psychological coercion' without more does not establish duress. At a minimum there must be an implied threat of 'force, violence, danger, hardship or retribution.' " (*Id*. at pp. 1250-1251, fn. omitted.)

Here, it is undisputed that defendant was bigger and older than Jenny, and he apparently had Jenny's confidence and trust. However, there is no evidence defendant occupied a position of authority in the household such that she might feel obligated to do

what he said. Nor is there any evidence that Jenny's parents ever made defendant responsible for Jenny or required or asked him to supervise her. Concerning counts 2 and 4, there is no evidence that defendant threatened to use force or violence if she did not acquiesce to him. There is no evidence that he directed her to do any acts. (Cf. *People v. Cochran, supra*, 103 Cal.App.4th 8 [father directing daughter's actions].) And although defendant told Jenny not to tell anyone, that warning came *after* the molestation and not as a form of duress by which the molestation was committed. (See *People v. Hecker, supra*, 219 Cal.App.3d at p. 1251, fn. 7.) Moreover, there is no evidence that defendant expressly or implicitly threatened any consequences if Jenny told anyone. Indeed, Jenny told her cousin about being molested. There is also no evidence that defendant said anything to intimidate or frighten Jenny into acquiescence.

Given the record, we conclude that the trial court's findings of force, duress, menace, et cetera in connection with counts 2 and 4 are not supported by substantial evidence. Therefore, the convictions on those counts cannot stand.

However, when a verdict or finding is contrary to law or evidence, but the evidence shows the defendant to be guilty of a lesser-included offense of the crime charged, we may modify the judgment to reduce the verdict to the lesser offense. (Pen. Code, § 1260; *People v. Kelly* (1992) 1 Cal.4th 495, 528; e.g., *People v. Matian* (1995) 35 Cal.App.4th 480 [reducing conviction for felony false imprisonment to misdemeanor false imprisonment].) Here, defendant seeks only a reduction to the lesser included offense.

It is established that committing a lewd act in violation of section 288, subdivision (a) is necessarily included in the offense of committing a forcible lewd act in violation of section 288, subdivision (b)(1). (*People v. Ward* (1986) 188 Cal.App.3d 459, 472-473.) One cannot commit a lewd act by force without committing a lewd act. Accordingly, we shall direct the superior court to modify the convictions on counts 2 and 4.

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that defense counsel failed to provide effective assistance and thereby denied him the right to counsel.

"To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.] When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.] Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., that, ' " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

Defendant notes that under the parties' stipulation, the court could consider the transcripts of the police interviews with the victims and defendant. At trial, both sides waived opening statements. Defense counsel called one witness: defendant. The prosecution called no witnesses. Both parties waived closing argument. The court then found defendant guilty and scheduled a sentencing hearing, saying it was interested in hearing the factors in aggravation and mitigation. However, at the sentencing hearing, defense counsel made no argument at all.

Defendant faults counsel for not making any argument at the close of trial or at the sentencing hearing. He claims that the omissions were equivalent to having no counsel at all and precluded him from meaningfully testing the prosecution's case. Defendant asserts that this was especially so at sentencing because the court had previously solicited information concerning the factors in aggravation and mitigation.

Given (1) the stipulation concerning the interview transcripts, (2) the prosecution's election not to make an opening statement or closing argument, (3) the brevity and simplicity of defendant's testimony, and (4) the fact that the court was the trier of fact, defense counsel reasonably could have found closing argument to be unnecessary. Defendant does not suggest what, if anything, defense counsel could and should have argued that was not already obvious to the court. Moreover, counsel may well have thought that the less said the better. In this regard, we observe that if defense counsel had offered closing argument, he might have precipitated rebuttal argument, in which the prosecution emphasized the aggravating circumstances, defendant's confession, and the lack of evidence that defendant was under the influence of anything when he spoke to the police.

Concerning the sentencing hearing, we note that the probation report stated that defendant continued to deny any wrongdoing. It listed four factors in aggravation and only one in mitigation: defendant's lack of a criminal record. The report pointed out that while in jail, defendant had participated in Bible studies. At the sentencing hearing, the court said it had read the probation report. Thereafter, the prosecutor did not offer any argument. Again, defense counsel reasonably could have concluded that the mitigating circumstances were obvious and arguing them could only invite rebuttal with the more numerous aggravating circumstances and the additional fact that defendant lacked remorse and continued to deny culpability.

Defendant argues that counsel should have argued for a lesser sentence based on defendant's lack of a record and agreement to resolve the case without requiring the victims to testify. However, the court expressly noted these factors before rendering sentence. Thus, defendant cannot show that counsel was incompetent for not mentioning them; nor can he show that counsel's failure to mention them was prejudicial.

Finally, we have reviewed the record of the proceedings before, during, and after trial, and we reject defendant's view that counsel's performance, especially his failure to

argue at trial and sentencing, was equivalent to having no attorney to represent him. (See *United States v. Cronic* (1984) 466 U.S. 648, 656-657, 659 [performance may be so deficient as to constitute denial of counsel].) Defendant's reliance on *Martin v. Rose* (6th Cir. 1984) 744 F.2d 1245, *Tucker v. Day* (5th Cir. 1992) 969 F.2d 155, and *Patrasso v. Nelson* (7th Cir. 1997) 121 F.3d 297 is misplaced. In *Martin*, counsel did not participate in jury selection, made no opening statement, and failed to cross-examine witnesses. In *Tucker*, counsel stood mute during resentencing, and when the defendant was asked if he had counsel, counsel said he was simply standing in, implicitly relying on what defense counsel had done at the previous sentencing hearing. In *Patrasso*, defense counsel was mute after the prosecutor argued for an aggravated sentence. These cases are materially distinguishable and do not suggest that counsel, in effect, abandoned defendant and failed to test the adequacy of the prosecution's case.

DNA TESTING

Defendant contends that requiring him to submit to DNA testing under section 296 violates his Fourth Amendment rights.[3]

Section 296, part of the DNA Forensic Identification Data Base and Data Bank Act of 1998, requires that every person convicted of specified crimes, including continuous sexual abuse of a child under 14 years of age (§ 288.5), must provide two blood specimens, a saliva sample, a right thumbprint and full palm impressions of each hand for law enforcement identification analysis. (§§ 296, subd. (a)(1)(A); see 290, subd. (a)(2)(A).) The California Department of Justice is to serve as a repository for

[3] The People argue that defendant waived this claim by failing to object below. Defendant admits he did not object to this condition in the trial court, but asserts that the claim is cognizable on appeal because he raises a constitutional issue that involves the application of a penal statute. He also argues that the claim is cognizable because it involves only a question of law on undisputed facts. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 118.) We agree that the claim raises only a question of law and therefore decline to apply the waiver doctrine.

those items, perform a DNA analysis and any other forensic identification of them, and "store, compile, correlate, compare, maintain, and use DNA and forensic identification profiles and records" (§ 295.1, subd. (c)) for use as an "effective law enforcement tool" (§ 295, subd. (b)(3)) in the "expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other violent crimes, the exclusion of suspects who are being investigated for these crimes, and the identification of missing and unidentified persons, particularly abducted children." (§ 295, subd. (c).)

Defendant argues that the involuntary collection of samples constitutes an unreasonable search because it is not based on any particularized suspicion of unlawful conduct and does not fall within recognized exceptions created for certain types of suspicionless searches, including searches based on " 'special needs' " designed to serve a purpose other than solving and punishing crimes. (See *City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 37; *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 619.)

We need not discuss this claim in any detail, for it has been fully outlined, analyzed, and unanimously rejected by appellate courts, including this court. (*People v. Adams* (2004) 115 Cal.App.4th 243, 255-259 [Sixth District]; *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505-509 [Third District]; *People v. King* (2000) 82 Cal.App.4th 1363, 1369-1378 [First District, Div. 1].)[4]

Here, we reaffirm the conclusion we reached in *People v. Adams, supra,* 115 Cal.App.4th 243, that section 296 served a compelling governmental interest that outweighed the *diminished* expectation of privacy of a person convicted of one of the enumerated crimes. (*Id*. at pp. 257-258.) Moreover, we rejected the notion that the collection of DNA samples without a particularized suspicion of unlawful activity could

[4] Similar challenges to DNA collection statutes in other jurisdictions have also been rejected. (See Annotation, Validity, Construction, and Operation of State DNA Database Statutes (2000) 76 A.L.R.5th 239.)

only be justified if it came within the " 'special needs' " exception. (*Ibid*.) In doing so, we distinguished: *Indianapolis v. Edmond, supra*, 531 U.S. 32 and *Ferguson v. Charleston* (2001) 532 U.S. 67, cited by the defendant in that case and defendant here, which involved searches of the *general public* rather than searches of convicted felons, who "do not enjoy the same expectation of privacy that non-convicts do." (*People v. Adams, supra*, 115 Cal.App.4th at p. 258.)

Defendant acknowledges the authority contrary to his position but argues that *Adams* rests on a false and irrelevant premise—i.e., that convicts do not enjoy the same expectations of privacy as the general public. However, "[I]mprisonment carries with it the circumscription or loss of many significant rights." (*Hudson v. Palmer* (1984) 468 U.S. 517, 524. "The reduction in a convicted person's reasonable expectation of privacy specifically extends to that person's identity. (*People v. King, supra*, 82 Cal.App.4th at p. 1374.) By their commissions of a crime and subsequent convictions, persons such as appellant have forfeited any legitimate expectation of privacy in their identities. In short, any argument that Fourth Amendment privacy interests do not prohibit gathering information concerning identity from the person of one who has been convicted of a serious crime, or of retaining that information for crime enforcement purposes, is an argument that long ago was resolved in favor of the government." (*Id.* at p. 1375, fn. omitted.)

DISPOSITION

The judgment is reversed. The Superior Court is directed to enter convictions on counts 2 and 4 for violating section 288, subdivision (a) and to resentence defendant.[5]

[5] Since we reverse the judgment and remand the matter for resentencing, we need not address defendant's claim that in imposing an aggravated term for one count, the court violated his right to a jury trial as explained in *Blakely v. Washington* (2004) 542 U.S. ____ [124 S.Ct. 2531].

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.